

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JESSE SOLOMON
401 SW Bunker Street
Madison FL 32340,

Plaintiff

v.

Civil Action No. _____

THE BERT BELL/PETE ROZELLE
NFL PLAYER RETIREMENT PLAN
Suite 2420
200 St. Paul Place
Baltimore, Maryland 21202-2040

- and -

THE NFL PLAYER SUPPLEMENTAL
DISABILITY PLAN
Suite 2420
200 St. Paul Place
Baltimore, Maryland 21202-2040,

Defendants.

* * * * *

**COMPLAINT FOR MONEY DAMAGES,
DECLARATORY AND INJUNCTIVE RELIEF**

NOW COMES Plaintiff Jesse Solomon, by and through his attorneys Zuckerman
Spaeder LLP, who complains and alleges as follows:

INTRODUCTION

1. This is a complaint for money damages, declaratory relief, and injunctive relief under the Employee Retirement Income and Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA") against Defendants The Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Retirement Plan") and The NFL Player Supplemental Disability Plan (the

“Supplemental Plan) (collectively, Defendants are referred to as the “NFL Plan” or the “Plan”).

2. Professional football as played in the NFL is the most violent game in America (if not the world), often leading to career-ending and life-altering injuries for players. The NFL’s own internal estimates, recently uncovered as part of the League’s efforts to settle ongoing class-action brain-injury litigation, are that nearly a third of retired players will develop long-term cognitive problems and that the conditions are likely to emerge at notably younger ages than in the general population. *In re National Football League Players’ Concussion Injury Litigation*, No. 2:12-md-02323 (AB), MDL No. 2323 (E.D. Pa.) (the “*Concussion Litigation*”).

3. NFL players, through their union, have collectively bargained with NFL team owners for disability benefits administered by the Plan. Players who become totally and permanently disabled (“TPD”) and therefore unable to work as the result of an NFL injury – including the whole range of orthopedic and brain injuries that are the regular result of pro football -- are entitled to generous disability benefits, with the highest levels of benefits set aside for former players who become TPD at the time of or shortly after their NFL injury, or within fifteen years of retirement.

4. Jesse Solomon suffered thousands of hits and dozens of injuries during his nine years of pro football, playing the linebacker position from 1986 until the 1994-95 season. An orthopedist hired by the NFL Plan to examine Mr. Solomon found that he had permanent injuries to the “neck, shoulder, elbow, hands, knees, ankle, feet, *etc.*,” all caused by pro football. A neurologist similarly retained by the Plan found that Mr. Solomon suffered from “severe cognitive impairment, depression, anxiety, and near-

daily migraine headaches” caused by “innumerable” on-the-field collisions and “many Grade 1 and Grade 2 cerebral concussions” resulting in “severe post-concussion/post-traumatic syndrome.” The same Plan-selected neurologist concurred with the assessment that Mr. Solomon “probably is demonstrating features of Chronic Traumatic Encephalopathy,” or CTE – the hallmark of the NFL’s legacy of brain injuries for its retired players.¹

5. Although Mr. Solomon worked for a decade after leaving the NFL, his injuries preventing him from working after 2007, well within 15 years of his 1995 retirement from pro football. A Social Security Administration (“SSA”) Administrative Law Judge found him completely disabled as of October 29, 2008, and the Plan’s language expressly requires that a player found disabled by the SSA “is deemed [by the Plan] to be totally and permanently disabled.” Mr. Solomon’s treating physicians concur that his numerous concussions and orthopedic injuries disabled him by 2008. But despite these clear-cut medical and legal findings, the NFL Plan concluded that Mr. Solomon lacked evidence of his disability before March 31, 2010, 15 years after the end of his last NFL season. The Plan did so by relying on evidence that the Plan had *already rejected* in deciding Mr. Solomon’s disability claim. Based on this spurious reasoning, the Plan denied Mr. Solomon the higher level of Football Degenerative disability benefits he had earned.

¹ CTE is a unique neurodegenerative disease, which is different from Alzheimer’s, dementia, ALS and other diseases or syndromes caused by pro football’s repetitive blows to the head. In its milder forms, CTE is characterized by a mood disorder with disabling depression and bouts of rage. In more severe forms, CTE can cause severe and disabling confusion and memory loss.

6. Defendants have abused their discretion in administering the NFL Plan by denying Mr. Solomon the full TPD benefits to which he is entitled. This Court should correct that injustice and order the Plan to grant Plaintiff those benefits.

PARTIES

7. Jesse Solomon is a resident of the State of Florida. He has been unemployed since 2007 and receives limited TPD benefits from the Plan.

8. The Retirement Plan and the Supplemental Plan are both employee pension benefit plans within the meaning of § 3(2)(A) of ERISA, 29 U.S.C. §1002(2)(A), created for the benefit of the employees of member teams of the National Football League ("NFL"). The Supplemental Plan was created for the purpose of paying disability benefits in excess of the limits of the Retirement Plan.

JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction under Section 502(e) of ERISA, 29 U.S.C. § 1132(e), and 28 U.S.C. § 1331.

10. Venue is proper because the defendant ERISA plans are administered in Maryland and the wrongful denial of benefits took place here. 29 U.S.C. § 1132(e) and 28 U.S.C. § 1391.

STATEMENT OF FACTS

A. Governance of the Plan

11. Upon information and belief, eligibility and disability benefit decisions for both the Retirement Plan and the Supplemental Plan are made in the first instance by a two-person Disability Initial Claims Committee (the "DICC"), subject to review by or appeal to the Retirement Board (the "Board"), which consists of six voting members who

meet quarterly. Half the members of the DICC and half the voting members of the Board are appointed by the NFL (*i.e.*, team owners) and the other half are appointed by the NFL Player's Association (the "NFLPA") (*i.e.*, the players' union).

12. The terms of the Retirement Plan and the Supplemental Plan are set forth in documents that are amended and restated from time to time by the Board (collectively, the "Plan Document").

13. Pursuant to § 8.7(b) of the Plan Document, any action by the DICC concerning a decision on disability benefits requires a unanimous decision by both members of that committee. Pursuant to § 8.7(a), any action by the Board concerning a decision on disability benefits requires an affirmative vote by four of the six voting members.

14. Upon information and belief, neither the Board nor the DICC includes any members with relevant health care or disability experience.

B. Relevant Disability Benefits

15. Section 5.2(a) of the Plan Document states that a former player "will be deemed to be [TPD] if the [Board] or the [DICC] finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit."

16. Effective April 1, 2007, Section 5.2(b) of the Plan Document provides that "a Player who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the

time he applies, will be deemed to be totally and permanently disabled," with exceptions not relevant here.

17. There are four types of TPD benefits available under the Retirement Plan, only three of which are relevant to this action. In descending order of benefit amounts, the three types are:

(a) "Active Football" benefits, awarded pursuant to § 5.1(a) of the Plan Document where the disability results from NFL football activities, the player is an "Active Player" as that term is defined in the Plan Document, and the player becomes TPD "shortly after" the disability first arises;

(b) "Football Degenerative" benefits awarded pursuant to § 5.1(c) of the Plan Document where the disability arises out of NFL football activities but the player does not become TPD "shortly after" the disability first arises (but in no event later than fifteen years from retirement); and

(c) "Inactive" benefits, awarded pursuant to § 5.1(d) of the Plan Document where the total and permanent disability arises out of other than NFL football activities.

18. Section 6 of the Plan Document also provides for "Line-of-Duty Disability Benefits" to ex-players who suffer a "substantial disablement . . . arising out of League football activities."

19. Because the type of benefits depends on whether the disability is the result of playing NFL football, the Board and/or the DICC must first make a determination of that issue. When the NFL Plan determines that the disability is the result of NFL football activities, the date when the disability arose must also be determined. As explained above, under § 5.1(c) of the Plan Document, a player who becomes TPD

within fifteen years of the end of his last NFL football season is entitled to the second-highest level of benefits, Football Degenerative.

20. Lately, the NFL Plan has taken steps to eliminate a definitive medical determination of the onset date of a disability by changing the Plan's form provided to physicians selected by the Plan for independent medical examinations. Previously, the "Physician's Report" form which the examining doctor was asked to complete asked the specific question, "When did present disability occur," so that the onset date of the disability – and thus the type of benefits – could be determined based on expert medical evidence. However, in recent years the Plan has changed its form to delete this question. The effect, if not the purpose, of this change was to permit the Board and the DICC to claim uncertainty about the onset date of claimants' total and permanent disability; to substitute their unqualified medical judgment for that of examining physicians; and thus to deny claimants benefits to which they were entitled.

C. Jesse Solomon

21. Jesse Solomon was born in 1963. He graduated from Florida State University with a degree in political science, then played nine seasons of NFL football, principally as a linebacker, from 1986 to 1994 for the Minnesota Vikings, Dallas Cowboys, Tampa Bay Buccaneers, Miami Dolphins and Dallas Cowboys. During his nine years and more than 100 games in this extraordinarily violent sport, Mr. Solomon endured thousands of hits, dozens of injuries, multiple concussions, and five different operations on his right and left knees.

22. Following his retirement after the 1994-95 season due to an injury that separated his quadriceps tendon from his kneecap, Mr. Solomon returned to college,

completed a Masters program at Florida A&M University, received a Florida teaching and coaching certificate, and worked as a high school football coach and physical education teacher. But his multiple injuries, concussions, and surgeries began to take their toll, and as both the years and the pain advanced, he became progressively unable to work for a living. At least by 2008 (13 years after retiring from the NFL), and probably before that date, he was substantially unable to hold down a job because of the combined effect of his orthopedic and brain injuries. Mr. Solomon's employment income after that date was zero. He applied for TPD benefits twice: on March 11, 2009 (that application was denied), and on December 12, 2010.

23. Following Mr. Solomon's December 2010 application, on February 17, 2011, a neurologist appointed by the Plan, Dr. Adam DiDio, examined Mr. Solomon to address complaints of cognitive impairment, anxiety, depression, and severe recurring headaches. These included "severe problems with" Mr. Solomon's memory, "poor concentration and focus," becoming "easily distracted," being "easily angered" and "prone to outbursts," "severe headaches on a near daily basis," and "dizziness and blurred vision." As a result, Mr. Solomon – despite his substantial education, training and experience as a coach and educator – reported losing several jobs for "losing his cool."

24. Dr. DiDio found that Mr. Solomon suffered from "severe cognitive impairment, depression, anxiety, and near-daily migraine headaches" caused by "innumerable" on-the-field collisions and "many Grade 1 and Grade 2 cerebral concussions" resulting in "severe post-concussion/post-traumatic syndrome." Dr. DiDio went on to "agree with [the] assessment" that Mr. Solomon "probably is demonstrating

features of chronic traumatic encephalopathy (CTE).” (As explained above, CTE is the progressive, degenerative disease that is the direct result of pro football’s multiple, high speed, violent collisions.) Dr. DiDio found that Mr. Solomon was totally and permanently disabled.

25. These medical findings about Mr. Solomon’s CTE by the NFL Plan’s doctor conflicted sharply with positions the NFL has taken in the *Concussion Litigation*. There, for example, the NFL’s lawyers have asserted that:

- “The science regarding CTE is new.”
- “[N]o conclusions relating to the causes of CTE or the diagnostic and clinical profile of CTE can yet be credibly or reliably established.”
- “The specific diagnostic profile of CTE and its causes or even association with football are unknown.”
- “[A]s of today, CTE can be diagnosed only post-mortem through a neuropathic examination of a decedent’s brain.”

[*Concussion Litigation*, D.E. #6422, Nov. 12, 2014, National Football League’s and NFL Properties LLC’s Memorandum of Law in Support of Final Approval of the Class Action Settlement Agreement and in Response to Objections, at 85, 86, 89 n.37.]

26. These contradictions between the findings of the NFL Plan’s doctor, and the litigation position taken by the League in the *Concussion Litigation*, could not possibly be reconciled. As a result, the NFL Plan chose to defy the recommendation of its own hand-picked physician. On March 9, 2011, the DICC ruled that Mr. Solomon was not disabled, and denied his claim. Mr. Solomon filed an appeal to the Retirement Board.

27. Meanwhile, recognizing the extraordinary extent of Mr. Solomon’s injuries, on June 21, 2011, an Administrative Law Judge of the Social Security Administration (“SSA”) found that Mr. Solomon was disabled, and that this disability was present as of

October 29, 2008. Mr. Solomon's treating physicians concurred, finding in 2008 that he suffered from chronic and increasing pain, along with growing numbness in his hands and feet and changes to his spinal column. Similarly in 2008, an extensive Functional Abilities Evaluation performed for Mr. Solomon's orthopedist found that Mr. Solomon was unable to perform even sedentary work.

28. Thus, in considering Mr. Solomon's appeal of its denial of TPD benefits, the Board had before it overwhelming evidence – from the Board's own hand-picked doctor, the Social Security Administration, and from other treating physicians -- not only that Mr. Solomon was totally and permanently disabled, but also that his disability had begun in 2008, following his last employment in 2007. Given Mr. Solomon's 1995 retirement from football, this evidence plainly supported a finding of total and permanent disability well within the 15-year cutoff imposed by the Plan Document. Yet on August 10, 2011, the Board granted Mr. Solomon only the limited "Inactive" TPD benefits, claiming – without identifying, let alone discussing, the evidence described above – that "the record did not support a finding of total and permanent disability prior to March 31, 2010."

29. Mr. Solomon appealed again, on September 27, 2011. He pointed out that the SSA has already determined he was disabled as of October 2008 – long before the 15-year limit on Football Degenerative benefits -- and asked the Retirement Board to "Please consider [the] matter carefully."

30. Defendants' own Plan Document requires them to accept the SSA's findings of disability, whenever the SSA has acted. Yet in their November 23, 2011 final decision, the Retirement Board rejected the same Administrative Law Judge's finding

that Mr. Solomon was disabled as of 2008, asserting that such “decisions are not binding on the plan,” and that Mr. Solomon must not have been disabled in 2008, because the Plan had previously denied his 2009 claim.

31. But the Board’s assertions directly contradict § 5.2(b) of the Plan Document, which states that a retiree found disabled by Social Security “*will be deemed to be* totally and permanently disabled.” (Emphasis added.) The Social Security determination of Mr. Solomon’s 2008 disability thus overrode and displaced any contrary decision or finding by the Retirement Board.

32. As explained above, at one time the Plan’s form for medical reports – the same form filled out by Dr. DiDio – required the examining physician to state when a disability occurred. Here, that information would have directly addressed the Plan’s reason for denying Mr. Solomon’s claim. But by intentionally changing its forms to delete this critical information, the Plan gave itself the ability to obscure this vital fact and to deny benefits to retired players who badly need them.

33. Defendants’ denial of full TPD benefits was not the result of a deliberate, principled reasoning process, and was not based on a complete administrative record that is the product of a fair claim-evaluation process.

34. Rather, Defendants’ machinations had two obvious objectives. The first was to place Mr. Solomon’s disability more than 15 years after his retirement, and thus to reduce his rightfully earned, collectively bargained disability pension benefits by approximately \$100,000 per year.

35. The second was to align the NFL Plan’s treatment of Mr. Solomon’s CTE with the NFL’s litigation position in the *Concussion Litigation*, even if that required

ignoring the conclusions of the NFL's own doctor. These actions were an obvious and blatant abuse of discretion, not to mention a breach of the Plans' fiduciary duty to its participants, and require that Defendants' actions be set aside and that proper benefits be awarded.

COUNT I

36. The allegations of paragraphs 1 through 35 are incorporated by reference, as if fully set forth herein.

37. Plaintiff has exhausted his remedies, as described above, and otherwise satisfied all prerequisites to the maintenance of this action.

38. Mr. Solomon became totally and permanently disabled as the result of a League football activity on or before October 29, 2008, within fifteen years of his last NFL football season. As such, he is entitled to full "Football Degenerative" benefits under the Plan as of that date.

39. By wrongfully denying Mr. Solomon the full "Football Degenerative" disability benefits due to him in accordance with the Plan, Defendants have failed to act in compliance with the language of the documents and instruments governing the Plan in violation of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3).

40. The actions taken by the Retirement Plan and the Supplemental Plan were wrongful, willful and taken in bad faith.

WHEREFORE, Plaintiff requests that this Court grant him the following relief:

A. A judgment declaring that:

- (1) Defendants' refusals to award Plaintiff Solomon "Football Degenerative" disability benefits effective as of October 29, 2008 are void; and
- (2) Defendants are obligated to credit and pay Mr. Solomon "Football Degenerative" benefits, retroactive to and effective as of October 1, 2008, without regard to any other limitation set forth in the Plan Document(s);

B. A preliminary and permanent injunction, enjoining Defendants from reducing the benefits payable to Plaintiff as described above;

C. A judgment awarding Plaintiff Solomon "Football Degenerative" disability benefits retroactive to October 1, 2008, and placing him in the same position in which he would have been if the Plans had acted properly upon Plaintiff's applications for disability benefits, including an appropriate interest factor;

D. An award of attorney's fees and costs; and

E. Such other and further monetary, declaratory, or injunctive relief as may be just and necessary.

Dated: November 14, 2014

/s/

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